

Appendix D

MODEL NOTICE DENYING REDUCTION IN SETTLEMENT AMOUNT BASED ON INABILITY TO PAY

[insert date]

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

[PRP Name]

[Address]

[City, State, Zip Code]

Re: Results of EPA Analysis of Ability-To-Pay Claim and Offer of
[if applicable, insert “De Minimis”] Settlement Regarding the
[site name] in [site location]

Dear [PRP Name]:

Thank you for [your or company name] recent correspondence dated [insert date] and the information you provided regarding [your or company’s name] inability, or limited ability, to pay response costs at the [site location] (“the Site”). [If applicable, insert “In a [insert date] letter, the United States Environmental Protection Agency’s (“EPA” or “the Agency”) offered to resolve [your or company’s name] potential liability at the Site under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), commonly known as the federal Superfund law. In response to that letter, [you or company name] informed EPA that you were unable to pay the settlement or “cashout” amount of [\$_____] without suffering undue financial hardship and provided EPA with written information to support [your or company’s name] financial hardship claim.”]

Based upon this information, EPA has determined that [you or company name] do not qualify for a reduction in settlement amount [if applicable, insert “or alternative payment method”]. This letter describes the results of EPA’s analysis of [your or company’s name] inability or limited ability to pay (“ATP”) claim [if applicable, insert “and renews EPA’s [if applicable, insert “de minimis”] party settlement cashout offer of [\$_____]. Details on the terms of this offer and how to accept it are provided below. Please note that the deadline for accepting the offer is **[insert deadline date in bold]**.”]

EPA's Analysis of ATP Claim

EPA recognizes that some potentially responsible parties ("PRPs") may be unable to pay the entire [if applicable, insert "de minimis"] cashout settlement amount proposed by EPA. Therefore, the Agency is willing to resolve a PRP's liability for a reduced settlement amount where a PRP demonstrates an inability, or limited ability, to pay. To ensure fairness among all PRPs, EPA carefully and critically considers the information provided regarding a claimant's financial situation in accordance with CERCLA § 122(g)(7) and guided by the Agency's September 30, 1997 policy on Superfund ATP determinations.¹

To obtain a settlement based on an ATP claim, a PRP must show that the payment amount requested is likely to cause undue financial hardship. Such undue financial hardship may be shown when the original payment amount would deprive a party of ordinary and necessary assets or render the party unable to pay for ordinary and necessary business expenses and/or ordinary and necessary living expenses. When making this determination, EPA considers a party's overall financial condition (including any applicable insurance policies) and demonstrable limitations on the ability to raise revenues. EPA makes its determination based on the information provided by the party and, as necessary and appropriate, other publicly available information sources.

Based on this information, EPA has determined that [you or company name] do not qualify for a reduction in settlement amount [if applicable, insert "or alternative payment method"]. EPA has determined that you have sufficient cash flow, income, assets, and/or borrowing capacity to pay [if applicable, insert "the full cashout amount of [\$_____]"] without significantly affecting [your or company's name] ability to [for businesses, insert "continue basic business operations."] [for individuals, insert "meet ordinary and necessary living expenses."] [If the ATP determination is based, in part, upon of the availability of insurance, insert the following: "This determination is based, in part, on the conclusion that you likely have current or past insurance policies that cover all or a portion of the cashout amount proposed by EPA. Please note that most insurance policies will require that you timely notify your carrier(s) of a claim against you."] A description of the basis of our determination on [your or company's name] ATP claim is enclosed in Attachment 1.

[If EPA is renewing an earlier settlement offer, insert the following section:

Opportunity to Settle

EPA is renewing its earlier [insert date] [if applicable, insert "de minimis"] settlement offer for the [site name] for the amount of [_____]. As explained in our [insert date] letter, if [you or company name] choose to accept EPA's [if applicable, insert "de minimis"] settlement

¹ See EPA's "General Policy on Superfund Ability to Pay Determinations" (Sept. 30, 1997) which is available on EPA's website at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/genpol-atp-rpt.pdf>.

offer of [\$____], [you or company name] will receive: (1) a covenant not to sue, which is a promise that EPA will not bring any future legal action against [you or company name] at the Site for the specific matters addressed in the settlement; and (2) contribution protection, which provides [you or company name] with protection from being sued by other responsible parties at the Site for the specific matters addressed in the settlement. Participation in this settlement means that you are settling directly with EPA.

If [you or company name] would like to accept EPA's offer of [\$____] and participate in the settlement, please complete the signature page of the enclosed settlement and return the signed settlement agreement to [name and address of regional contact]. Please be prepared to remit payment of [\$____] to EPA as directed in the settlement instructions included with this settlement offer. We suggest that [you or company name] keep a copy of the entire settlement for your files. If we do not receive your signed copy by **[insert deadline date in bold]**, we will assume that [you or company name] are not interested in pursuing a *[if applicable, insert "de minimis"]* settlement with EPA for this Site.

If [you or company name] continue to believe that the settlement offer amount is too high, [you or company name] may submit additional financial information to EPA. EPA will only consider such new information if it shows a significant change in circumstances since [your or company's name] last submission, or if it includes a potentially significant piece of information that [you or company name] did not include in your first submission.

Final approval of the settlement is subject to the review of authorized EPA *[unless site costs are less than \$500,000 include the following: "and United States Department of Justice (DOJ)"]* officials.² If [you or company name] have any questions about the [site name], EPA's ATP determination, the terms of the settlement, or how to respond to this settlement offer, please contact [name and phone number of regional contact].]

[If recipient is likely a small business, insert: "Finally, enclosed with this letter is a fact sheet about the Small Business Regulatory Enforcement Fairness Act ("SBREFA"), which includes information that may be helpful to small businesses."] We encourage your prompt attention and response to this matter.

Sincerely,

Enclosure(s)

² After final EPA [and DOJ] approval, EPA will publish the settlement for public comment and, barring any unforeseen circumstances, will notify you of the effective date of the settlement shortly thereafter.

Attachment 1

BASIS OF INABILITY TO PAY DETERMINATION

[*The attachment should list:*]

Site Name and Location

Name of the Party Subject to the Ability to Pay (“ATP”) Analysis

Party Identification Number

Proposed Settlement Amount

Documents Submitted by the ATP Candidate that Formed the Basis of the ATP Determination: Such documents include [*list the documents provided by party*] –

- A. The Initial Inability to Pay Request
- B. Five Most Recent Years of Individual Federal Income Tax Returns or Corporate Federal Income Tax Returns
- C. Five Most Recent Years of Business Financial Statements
- D. Individual Financial Data Form or Municipal Financial Data Form or Financial Questionnaire Developed by Region
- E. Other Financial Information, including (*list all that apply*):
 - Loan Applications
 - Financial Information Relating to Businesses owned by the ATP Candidate
 - Individual or Corporate State Income Tax Returns
 - Fair Market Value of Assets Owned by the ATP Candidate
 - Insurance Policies
 - Other Sources of Funds Available to the ATP Candidate, including (list all that apply): (a) for individuals, income and assets not in the name of the ATP Candidate, but that are available to the ATP Candidate, such as income from, and assets in, trusts and other related entities as well as the financial holdings of the ATP Candidate’s spouse; (b) for businesses,

financial information relating to other entities owned by the business and/or shareholders or directors of the business, financial information for a period of time greater than five years, and information that might assist in estimating the fair market value of assets, liabilities, income, and expenses of the ATP Candidate; and (c) for municipalities, annual audited financial statements; general obligation bond prospectuses, and annual budgets for [insert number] years.

Analysis. This section should discuss the documents submitted by the ATP Candidate and state a decision based upon the documents. For example:

“In support of [his/hers/its] inability or limited ability to pay claim, [the PRP] submitted the documents identified above. Our analysis of the submitted documentation indicates that, as of [date of latest documentation, such as latest federal tax return], [the PRP] has sufficient [specify any or all of the following: cash flow, income, assets, and/or borrowing capacity] to pay the entire proposed settlement amount of [\$____] without suffering undue financial hardship.”

Conclusion. This should be one sentence that restates the decision set forth in the analysis, such as:

“Based upon the documentation enumerated in paragraph 5 above, EPA has determined that [the PRP] is able to pay the entire proposed settlement amount of [\$____] without depriving you of ordinary and necessary assets or significantly affecting your ability to meet ordinary and necessary living expenses and/or pay for ordinary and necessary business expenses. EPA has determined that [the PRP] is able to pay the revised settlement amount of [\$____] without [*for business*: “jeopardizing the maintenance of basic business operations.”][*for individuals*: “significantly affecting your ability to meet ordinary and necessary living expenses.”]